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Nos. 83-1091 and 83-1094

In the Supreme Court of the United States

OCTOBER TERM, 1983

ANDRA A. CAPACI, PETITIONER

v.

KATZ & BESTHOFF, INC., AND
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

K & B, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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In No. 83-1094, petitioner K&B, Inc., contends that the court of appeals erred when it ruled that one of the district court's findings of nondiscrimination was clearly erroneous.

1. Andra Capaci filed a charge with the Equal Employment Opportunity Commission in January 1973, claiming that K&B violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by denying her a promotion to a

managerial position because of her sex. Subsequently, Capaci brought a Title VII action against K&B in the United States District Court for the Eastern District of Louisiana, and the Commission intervened as a plaintiff. Capaci pressed her individual claims; the Commission claimed that K&B systematically excluded women from management positions. Pet. App. A3, A40.[1]

There were two paths to management at K&B: the firm appointed "manager trainees," and it promoted pharmacists to the positions of chief pharmacist or assistant manager (Pet. App. A41). The Commission attempted to show that both selection processes were discriminatory, but the district court rejected both of the Commission's contentions (*id.* at A41-A89). The district court also rejected all of Capaci's various claims except one, an allegation that she was harassed in retaliation for filing the charge with the Commission (*id.* at A89-A109).

The court of appeals affirmed all of the district court's rulings on Capaci's claims (Pet. App. A29-A37) [2] and also upheld the district court's finding that the Commission had not shown that K&B discriminated in promoting pharmacists to managerial positions (*id.* at A14-A15). In addition, the court of appeals upheld the district court's finding that K&B did not discriminate in the selection of manager trainees after Capaci filed her charge with the Commission (see *id.* at A28). But the court of appeals held that the district court was clearly erroneous in ruling that the Commission failed to prove discrimination in the selection of manager

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[1] "Pet. App." refers to the appendix to the petition in No. 83-1094.

[2] In No. 83-1091, Capaci has sought review of this ruling. Capaci's claims present issues distinct from the Commission's. The Commission took no position on her claims at trial or on appeal and takes no position on the questions presented in her petition.

trainees during the period between the effective date of Title VII and the date on which Capaci filed her charge (*id.* at A4-A28).

The court of appeals summarized its reasons for reaching this conclusion as follows (Pet. App. A28):

> [T]here was: (1) an overwhelmingly strong statistical case [suggesting discrimination]; (2) a dearth of meaningful testimony by employees to rebut the numbers; (3) newspaper advertising which, while not determinative in itself, must be viewed as some evidence of discrimination.

The court of appeals stated that "the most important single fact presented to the district court" was that between the effective date of Title VII and the date on which Capaci filed her charge, K&B appointed 267 persons to positions as manager trainees and all 267 were men (Pet. App. A4). The court of appeals noted that the likelihood that this could occur as a result of random selection was infinitesimal, on the order of less than one in a billion. This calculation was based on labor market data, that is, on a comparison with various occupational groups from which manager trainees might be selected — for example, retail managers in the local area earning roughly the same amount as a K&B manager trainee. Pet. App. A4-A6, A45.

The district court, in finding that K&B had not discriminated in the selection of manager trainees, was apparently persuaded by K&B's contention that the Commission's statistics were invalid because the rigors of the job tended to discourage a disproportionate number of women from applying to be manager trainees (see Pet. App. A54-A55). The best way to assess this contention — which was, as the district court acknowledged, based only on the opinions of K&B's expert witness, not on any studies (see *id.* at A50)

— would have been to examine "applicant flow" data revealing the percentage of women applicants. But K&B had not retained its applications for the period in question, except for the year 1976-1977 (see *id.* at A7, A26 n.7). In that year, women were 19.2% of the applicants, a figure comparable to that suggested by the labor market data. The district court recognized, and the court of appeals agreed, that so long as the percentage of women in the applicant pool was greater than 2%, K&B's selection of *no* women would be statistically significant (see *id.* at A9, A55 n.13). For these reasons, and because it also considered K&B's other objections to the Commission's statistical showing and found them unconvincing (see *id.* at A8-A14), the court of appeals concluded that the record did not support the district court's ruling that the Commission's statistical case had been overcome.

The court of appeals noted, in addition, that other evidence buttressed the Commission's statistical case. For example, during the relevant period, K&B had routinely placed classified advertisements for manager trainees in the "Help-Wanted-Male" columns of newspapers (Pet. App. A22). Some advertisements for managerial positions specifically stated that men were sought (see *id.* at A21: "We are seeking a vital, aggressive man who is ready to realize his potential") — unlike the advertisements for such nonmanagerial positions as "counter girls" and "salesladies" (*id.* at A21-A22).

The court of appeals also relied on testimony offered by K&B itself. The court explained (Pet. App. A16): "After reviewing the record with some care, we find that K&B made a sizeable and respectable presentation of testimonial evidence that it did not discriminate against women after the Capaci charge was made. However, what little testimonial evidence was presented concerning practices prior to

the charge does not support the same conclusion." Specifically, K&B officials testified that their principal concern in the years after Title VII was enacted had been with discrimination on the basis of race, not sex, and that Capaci's charge had spurred them to examine more closely their practices concerning the hiring of women to management positions (*id.* at A18-A19).

2. K&B contends that the court of appeals exceeded the scope of review specified by the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). But the court of appeals explicitly recognized that it was "confined to asking whether the district court was clearly erroneous" (Pet. App. A26), and it stated: "This court and this panel take the clearly erroneous standard seriously, particularly in light of recent admonishment by the Supreme Court that we properly defer to district court fact findings in discrimination cases as we would in any other case" (*id.* at A28). Moreover, the court of appeals applied the clearly erroneous standard to uphold the district court's rulings in every respect but one, even though the district court's other findings of nondiscrimination were certainly open to question. For example, women were so severely underrepresented in the group of manager trainees appointed between the time Capaci filed her charge and the end of 1977 that the likelihood of random selection in that period was less than one in 10,000 (*id.* at A6).

K&B's principal assertion is that the court of appeals attached undue significance to the undisputed fact that between the effective date of Title VII and the filing of Capaci's charge, none of the 267 persons who entered the manager trainee program was a woman. But this is, of course, a dramatic disparity that obviously requires some explanation. Contrary to K&B's assertions, the court of appeals did not hold that a defendant in a Title VII action is "doomed * * * to defeat as soon as the zero goes into evidence. No explanation will do" (83-1094 Pet. 7). Instead,

the court of appeals considered K&B's proffered explanations with care (see Pet. App. A8-A14) and found not only that they were insufficient but that nonstatistical evidence strongly supported the inference of discrimination.

By contrast, the district court's discussion of the statistical evidence on this point was superficial and conclusory (see Pet. App. A54-A56). Notably, the district court, unlike the court of appeals, did not distinguish the periods before and after the filing of Capaci's charge, even though there was testimony from K&B officials suggesting that the firm's hiring practices changed at that point.

Indeed, K&B still fails to explain its failure to appoint a single women to a manager trainee position during the relevant period. K&B does not dispute the court of appeals' conclusion that that failure would be statistically significant even if the number of women in the group from which manager trainees were selected had been as low as 2%, and K&B suggests no reason whatever to believe that the number of women available for the positions even approached being that low. In these circumstances there is no reason for this Court to review the court of appeals' determination that one of the district court's several findings was clearly erroneous.

It is therefore respectfully submitted that the petition for a writ of certiorari in No. 83-1094 should be denied. The Commission takes no position on the petition in No. 83-1091.

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